FAYE LORENTZ,	)	
	)	
Plaintiff/Appellee,	)	
	)	Appeal No.
	)	01-A-01-9509-CH-00417
VS.	)	
	)	Wayne Chancery
	)	No. 8856
BERTIE PHILLIPS, SAM PHILLIPS, JR. and wife, MARTHA ANN PHILLIPS, and AUTO-OWNERS INSURANCE COMPANY,	)	
	)	
Defendants/Appellants.	)	

FILED

March 29, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF WAYNE COUNTY
AT WAYNESBORO, TENNESSEE

THE HONORABLE JAMES L. WEATHERFORD, JUDGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
KOCH, J.

O P I N I O N

This case involves the applicability of an exclusion clause in a policy of homeowner's insurance. The insured dwelling burned to the ground after the plaintiff moved out. The insurance company refused to pay for the fire loss, citing the clause excluding coverage for vandalism or malicious mischief, where the dwelling has been vacant for more than thirty days. The trial court found that the insurance company had failed to establish that the fire resulted from vandalism or malicious mischief, and ordered it to pay the policy proceeds to the plaintiff. We affirm.

I.

On December 29, 1981, Faye Lorentz entered into an installment contract to purchase a house and the land on which it stood. The price for the Collinwood Tennessee property was $13,000. The terms of the contract included a provision that Bertie Phillips, the vendor, would insure the frame dwelling for $14,000. Mrs. Phillips obtained an insurance policy with the appellant, Auto-Owners Insurance Company.

Mrs. Lorentz occupied the house for about ten years, during which time she faithfully paid the installments of $125 per month required by the contract of sale. In December of 1991, Mrs. Lorentz, who was about eighty years of age, moved to Iron City, Tennessee, and rented the house out to Mark and Violet Wright. Mrs. Lorentz continued to make her payments to Bertie Phillips.

In April or May of 1992, Mrs. Lorentz paid the final installment on the $13,000 price. At that time Bertie Phillips refused to execute a deed and demanded payment of an additional $1,000 before conveying title. On June 1, 1992, Mrs.

Lorentz paid Bertie Phillips $500 towards the $1,000 that had been added to the original purchase price.

The Wrights lived in the house for a few months, and moved out in March of 1992. The house remained vacant until it was completely destroyed in a fire that was discovered shortly after midnight on June 14, 1992. After investigation of the scene of the fire, the insurance company decided that the obligation on the policy was excused by the language of its vandalism clause, and they refused to pay for the damage. Faye Lorentz subsequently filed suit to compel the insurance company to pay.

II.

At trial the insurance company offered testimony and documents from three investigators: Robert Farris, Assistant Director of the Wayne County volunteer fire department, James Robertson, a senior Tennessee State Arson Investigator, and Michael E. Rambo, a fire investigator hired by the company. Based on their observations at the scene of the fire, all three were basically in agreement that the fire was unusually hot; that it started inside the house; and that some of the most common causes of accidental fires had to be ruled out, because the utilities were disconnected and there was no lightning on the night of the fire.

Mr. Farris, who was the first investigator on the scene, testified that no gas or kerosene cans were found, nor any lighters, matchbooks, burnt matches, cigarettes, or partially burnt rags with accelerant on them. Despite the lack of any physical evidence of the presence of human beings in the vacant house, the investigators all concluded that the condition of the fire scene indicated the fire had been intentionally set from inside the house. Mr. Robertson's opinion was partly

based on hearsay information that neighborhood kids had used the vacant house as a hangout.

However, Mark and Violet Wright, who had moved to Violet's mother's house, located between seventy-five and two hundred yards away from their former rental, testified that they had never observed children, homeless people or vagrants hanging around the vacant house, and that on the night of the fire they did not see any lights, hear any sounds, or notice anything suspicious in its vicinity before going to bed. Mrs. Lorentz testified that she inspected the dwelling periodically, that she did so two weeks before the fire, and that at the time it was securely locked, there was no sign of forced entry, and she observed nothing unusual in the vacant dwelling.

The trial court stated that the insurance company had failed to meet its burden of proof that the fire was intentional and not accidental, and entered judgment in favor of Faye Lorentz. The court ordered Mrs. Lorentz to pay $500 to Bertie Phillips to complete the total purchase price of the land sale contract, and ordered Auto-Owners Insurance to pay Mrs. Lorentz the full policy amount of $14,000. This appeal followed.

III.

The clause the appellant relied on to deny insurance benefits to the appellee is found in the section of the insurance contract entitled **"PERILS WE INSURE AGAINST."** The relevant parts of that section read:

> **1**. **Fire or Lightning.**
> . . .
> . . .
> **8. Vandalism or Malicious Mischief**
>
> This peril does not apply to loss:

> (a) at the insured premises if the dwelling has been vacant for more than 30 consecutive days immediately preceding the loss. . .

There is no dispute that the subject dwelling was vacant for more than thirty days preceding the loss. The only question for our determination is whether the trial court was correct in concluding that the appellant had failed to prove that the exclusion in the contract applied to the damage sustained by the appellee's property.

We note at the outset that the policy does not contain definitions of "vandalism" or of "malicious mischief." The appellee has directed our attention to definitions found in our criminal law. Tenn. Code Ann. § 39-14-408 reads:

> **Vandalism.--** (a) Any person who knowingly causes damage to or the destruction of any real or personal property of another ... knowing that he does not have the owner's effective consent is guilty of an offense under this section...

The term "malicious mischief" is found under Part 13 of the former code, which is titled "Vandalism and Injuries to Property."

> **Malicious mischief.--** Any person who causes willful physical injury to or the destruction of real or personal property of another from ill will or resentment towards the owner or possessor of such property, or from mere wantonness is guilty of a misdemeanor. (1982 Edition, T.C.A. § 39-3-1301)

Definitions found in general and scholarly works are consistent with the above. In Black's Law Dictionary, for example, vandalism is defined as "such willful or malicious acts as are intended to damage or destroy property." While malicious mischief is "willful destruction of personal property from actual ill will or resentment towards its owner or possessor." (Black's Law Dictionary 6th Edition, West Publishing Co., 1990). In Webster's Third New International Dictionary, vandalism is defined as "willful or malicious destruction of or defacement of things of beauty of of public or private property." (G.& C. Merriam Publishing Co., 1971)

A common element in all these definitions is the use of terms denoting malice, intention, or at the very least, knowledge. At trial, the defendant's expert witnesses all characterized the fire as "intentional." But even if the appellant's theory was correct, and it could prove that trespassing individuals had been inside the house, it is not at all clear that the court would be obligated to infer that the fire resulted from vandalism or malicious mischief. It appears that Mr. Farris used the term "intentional" simply to mean that some human agency was responsible for the fire, but he conceded on cross-examination that a fire may be caused by a human being and still be accidental.

We note that Mr. Farris and the other experts based their conclusions solely on circumstantial evidence which indicated that the fire was of unusual intensity, that it began inside the house rather than outside, and by elimination of alternative explanations. They could produce no evidence of intent or even of human agency in the genesis of the fire, but this was not for lack of trying. Mr. Rambo took samples of materials from four locations in the house, and sent them to the laboratory for analysis. The samples did not reveal the presence of any identifiable accelerant.

IV.

By stating that Auto-Owners had not met its burden of proof, the trial court correctly indicated that it was the appellant's burden to prove that the fire resulted from vandalism, not the appellee's burden to prove that it resulted from accident. The appellant challenges the trial court's allocation of these burdens by reference to this court's opinion in the unpublished case of *Breedlove v. Tennessee Farmers Mutual Insurance Company*, 1988 WL 67167.

Though *Breedlove* is not quite on point with the current case, we believe that to the extent that it can be relied upon, it bolsters the appellee's argument more

than it does that of the appellant. In *Breedlove*, we found that the burden rested on the insured of proving that the loss of cattle from his herd resulted from theft, one of the perils his policy insured against; when he failed to produce any proof of theft, the insurance company was not required to prove that the loss fell under the category of "mysterious loss of property," an exclusion under the policy.

In the present case, there is no doubt that the appellee's loss occurred because of fire, a peril the policy insured against. Since a covered peril had been established, it became the task of the insurance company, if it wished to prevail, to prove that the circumstances of the fire fell under the exclusion for vandalism or malicious mischief. The burden of proving vandalism or malicious mischief remained with the appellant at all times, though the appellee could (and did) introduce proof to negate or weaken the appellant's theory.

The insurance company produced circumstantial evidence that was suggestive of the conclusion they wished the trial court to reach. But the court also had to consider the lack of any admissable evidence that the house was used by trespassing parties, and of testimony to the contrary by Mrs. Lorentz and by Mark and Violet Wright. The negative laboratory findings on the presence of an accelerant, also had to weigh against the appellant's theory, despite Mr. Rambo's assurances that a such a finding meant very little.

After weighing all the evidence, the trial court found that the insurance company had failed to meet its burden of proof "that the fire was intentional, and not accidental in nature." We must presume that the trial court's findings of fact are correct, unless the preponderance of the evidence is otherwise. See Rule 13 (d) Tenn.R.App.P. We do not believe that the evidence preponderates against the trial court's findings.

V.

The judgment of the trial court is affirmed. Remand this cause to the Chancery Court of Wayne County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

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WILLIAM C. KOCH, JR., JUDGE